(1) S Court, U.S.

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No.

IN THE

Supreme Court Of The United States

GEHL COMPANY,

Petitioner,

v.

MARY KINSER, INDIVIDUALLY AND AS HEIR-AT-LAW AND PERSONAL REPRESENTATIVE OF THE ESTATE OF TIM KINSER, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The erroneous submission of an issue to the jury will require reversal when the jury has rendered a general verdict in the face of more than one issue, thereby precluding a determination by the reviewing court as to whether the jury relied on an improper ground. The Court of Appeals' decision in this product liability case determined that several theories of design defect submitted to the jury through plaintiff's expert witnesses were inadmissible under ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*** and ***Kumho Tire Co., Ltd. v. Carmichael***, but that one theory of design defect advanced by plaintiff's experts was admissible. Because it is impossible to determine from the jury's general verdict upon which theories of liability it relied in finding in favor of plaintiff, did the Court of Appeals improperly conclude that the submission to the jury of several theories of liability which were inadmissible constituted harmless error, as opposed to reversible error?

LIST OF PARTIES TO THE PROCEEDING

There are no parent or nonwholly-owned subsidiaries of Gehl Company.

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OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit has been published at 184 F.3d 1259 (10th Cir. 1999).

The decisions of the United States District Court for the District of Kansas denying defendant's motions for summary judgment and motion for a ***Daubert*** hearing have been published at 989 F.Supp. 1144 (D. Kan. 1997).

STATEMENT OF JURISIDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was issued on July 27, 1999 (Appendix A). Defendant, Gehl Company ("Gehl"), filed a petition for rehearing *en banc*, or, alternatively for panel rehearing on August 9, 1999. After directing plaintiffs to respond to defendant's petition (Appendix B), the Court of Appeals denied defendant's petition on September 10, 1999 (Appendix C).

This Court has jurisdiction to entertain this petition for writ of certiorari pursuant to the provisions of 28 U.S.C. §1254(1) and Supreme Court Rule 13(3).

STATEMENT OF THE CASE

On August 17, 1994, plaintiff's decedent, Tim Kinser, was baling hay with a Model 1870 baler manufactured and sold by Gehl. At some point in time, for some unknown reason, Mr. Kinser entangled himself in the baler, whose PTO was attached to a tractor and running, and received injuries from which he later died.

Plaintiff instituted this action against Gehl, alleging product liability theories of negligence, strict liability, and breach of implied warranty. Prior to trial, Gehl moved for summary judgment alleging, *inter alia*, that plaintiff's proposed expert testimony was inadmissible under ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d

469 (1993). The district court ruled that, under the United States Court of Appeals for the Tenth Circuit's decision in ***Compton v. Suburu of America, Inc.***, 82 F.3d 1513 (10th Cir. 1996), this Court's ***Daubert*** analysis was inapplicable to engineering testimony based solely on the expert witness' engineering background and experience, and not upon a particular methodology or technique. ***Kinser v. Gehl Company***, 989 F.Supp. at 1147.

After trial to a jury, the jury entered a general verdict against Gehl, and apportioned causal fault, 55 percent to Gehl and 45 percent to Mr. Kinser.

Gehl appealed, contending, *inter alia*, that: (1) plaintiff's expert testimony regarding the baler's alleged design defects was inadmissible under ***Daubert***; (2) absent such testimony, plaintiff failed to establish a *prima facia* products liability case against Gehl; and (3) at a minimum, the introduction of expert testimony inadmissible under ***Daubert*** entitled Gehl to a new trial.

While this case was pending on appeal, this Court issued its decision in ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). In ***Kumho Tire***, this Court rejected the Tenth Circuit's ***Compton*** rationale, and held that the ***Daubert*** factors should be considered by a district court in determining the admissibility of all expert testimony, including engineering expert testimony.

In ***Kinser v. Gehl Company***, 184 F.3d 1259 (10th Cir. 1999), the Tenth Circuit Court of Appeals affirmed the district court's entry of judgment on the jury's verdict. The critical flaw in the Court's decision, which is the subject of Gehl's petition for writ of certiorari, concerns Gehl's request for a new trial on the basis that plaintiffs' experts' testimony was inadmissible under ***Daubert***. Acknowledging that ***Compton*** was no longer good law and that the ***Daubert*** factors *did* apply to expert engineering testimony, the Tenth Circuit held that neither Jerry Purswell nor William Kennedy, plaintiff's experts, were qualified to testify to four possible, but never built or tested, alternative design concepts

for the baler. 184 F.3d at 1270-1272. The Court held that even though most of the expert testimony rendered by Purswell and Kennedy should have been excluded under the ***Daubert*** analysis, because *one* of their recommendations, i.e., the use of different guards, had allegedly been demonstrated to be feasible on other balers, the introduction of the inadmissible alternative design recommendations became "harmless error." 184 F.3d at 1272. Hence, the Court concluded that the introduction of evidence inadmissible under ***Daubert*** did not warrant a new trial. 184 F. 3d at 1272.

Gehl filed a petition for rehearing *en banc*, or, alternatively, for panel rehearing. The Tenth Circuit directed plaintiff to respond to Gehl's petition. (Appendix B) The Tenth Circuit denied Gehl's petition for rehearing *en banc*, or, alternatively, for panel rehearing. (Appendix C)

The District Court exercised jurisdiction pursuant to 28 U.S.C. § 1332. The United States Court of Appeals for the Tenth Circuit exercised jurisdiction pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

1. Introduction

There are several important reasons why this Court must grant Gehl's petition for writ of certiorari in this case. The first is that the Court of Appeals' decision unequivocally flies in the face of a fundamental tenet of appellate review endorsed by this Court, and by every federal circuit court which has addressed the issue, including the Tenth Circuit. Specifically, the Tenth Circuit's opinion conflicts with the principle that the erroneous submission of multiple alternative liability theories to the jury will require reversal when the jury has rendered a general verdict in the face of more than one issue, thereby precluding a determination by the reviewing court as to whether the jury relied on an improper ground. ***Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.***, 370 U.S. 19, 82 S.Ct. 1130, 1135-36, 8 L.Ed.2d 305 (1962); ***Dillard & Sons Construction, Inc. v. Burnup & Sims***

Comtec, Inc., 51 F.3d 910, 915-916 (10th Cir. 1995); ***Robertson v. Norton Company***, 148 F.3d 905, 908 (8th Cir. 1998).

Another fundamental tenet of appellate review with which the Tenth Circuit's opinion conflicts is that an appellate court may not try the facts, and the jury alone is vested with the power and obligation to weigh conflicting evidence and to assess the credibility of witnesses. ***See Amadeo v. Zant***, 486 U.S. 214, 108 S.Ct. 1771, 1776, 100 L.Ed.2d 249 (1988); ***Rodgers v. Hyatt***, 697 F.2d 899 (10th Cir. 1983).

Finally, the Tenth Circuit's decision eviscerates this Court's decisions in ***Daubert*** and ***Kumho Tire*** by holding that expert testimony regarding multiple theories of liability, which were improperly admitted under F.R.E. 702, and which could have formed the basis of the jury's verdict, are harmless error, so long as *any* of the experts' testimony regarding *other* theories of liability were admissible.

2. The Introduction of Expert Testimony Inadmissible under ***Daubert*** and ***Kumho Tire*** is Reversible, Not Harmless, Error.

A fundamental principle of appellate review endorsed by this Court, by the Tenth Circuit Court of Appeals, and by all other courts of which Gehl is aware, is that the erroneous submission of several theories of liability to the jury will require reversal when the jury has rendered a general verdict which thereby precludes a determination by the reviewing court of whether the jury relied on one of the improper theories. ***Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.***, 370 U.S. 19, 82 S.Ct. 1130, 1135-36, 8 L.Ed.2d 305 (1962); ***Dillard & Sons Construction, Inc. v. Burnup & Sims Comtec, Inc.***, 51 F.3d 910, 915-916 (10th Cir. 1995); ***Farrell v. Klein Tools, Inc.***, 866 F.2d 1294, 1298-1301 (10th Cir. 1989); ***Specht v. Jensen***, 853 F.2d 805, 808-809 (10th Cir. 1988); ***McMurray v. Deere & Co., Inc.***, 858 F.2d 1436, 1443-44 (10th Cir. 1988); ***Smith v. FMC Corp.***, 754 F.2d 873, 877 (10th Cir. 1985); ***see also Reeves v. Acromed Corp.***, 44 F.3d 300, 302-3 (5th Cir. 1995) (in a products liability action where district court

submits two or more alternative grounds for recovery to the jury on a single interrogatory and the plaintiff prevails, new trial is mandated if one of the grounds is "legally inadequate," since the reviewing court cannot determine whether the jury based its verdict on a sound or unsound theory). This principle of appellate review applies where the jury is instructed on a theory of liability, supported by evidence introduced at trial, which the appellate court determines to be erroneous. For example, in ***Sunkist Growers***, this Court held that a general verdict against cooperatives for treble damages under anti-trust laws could not be upheld, where the jury instructions would have improperly allowed the jury to base its verdict upon a finding of an illegal conspiracy solely among cooperatives.

Of logical necessity, the same rule applies where expert testimony is held on appeal to have been inadmissible, and it is impossible to determine whether the jury based its verdict on that inadmissible testimony. Generally, any error in admitting expert testimony which lacks a sufficient foundation of reliability, and which does not comport with this Court's ***Daubert*** criteria, constitutes reversible, not harmless, error. ***Weisgram v. Marley Company***, 169 F.3d 514, 519-20 (8th Cir. 1999), ***cert. granted*** September 28, 1999, 120 S.Ct. 11. In a product liability case, where evidence relevant to one of two or more theories subsumed in a verdict is erroneously admitted in violation of ***Daubert***, the verdict must be set aside, unless the appellate court can be convinced that the jury proceeded only on the sound ground. ***Robertson v. Norton Company***, ***supra*** (where sufficient evidence was presented of a manufacturing defect, but the Court of Appeals held that plaintiff's expert testimony regarding alleged inadequate warnings was inadmissible under ***Daubert***, the Court of Appeals was obligated to reverse, since it could not determine from the general verdict whether the jury's liability determination was based on a manufacturing defect or, instead, on an inadequate warning); ***see also Gast v. City of Fountain***, 870 P.2d 506, 511 (Colo. App. 1993) (***rev'd on other grounds***, 904 P.2d 478 (Colo. 1995) (in a case where plaintiff is electrocuted by contacting an overhead power line with an irrigation pipe, and plaintiff's expert testifies on two theories of negligence, only one of which was

legally viable, appellate court must reverse, since it was not possible to determine upon which theory of negligence the jury rendered its verdict). The appellate court must be able to conclude that it is highly probable that the error in the admission of such testimony did not contribute to the judgment. ***Asplundh Manufacturing Division v. Benton Harbor Engineering***, 57 F.3d 1190, 1206-1207 (3rd Cir. 1995). Stated differently, if the introduction of inadmissible expert testimony might have influenced the jury, the error is necessarily reversible error, not harmless error. ***Rainey v. Beech Aircraft Corp.***, 784 F.2d 1523, 1528 (11th Cir. 1986).

In this case, Purswell advanced on behalf of plaintiff several theories of design defect with respect to the baler. Purswell suggested that feasible alternative design concepts included: (1) the installation of an emergency shut-off mechanism on the front of the baler; (2) placement of the crop pick-up tines further back along the bottom of the baler; (3) revision of the hay holddown bar; (4) lengthening of the connecting tongue; and (5) construction of a different guard in front of the pick-up tines, similar to the guard installed on the John Deere 510 model. 184 F.3d at 1266. Plaintiff's other expert, Kennedy, also endorsed a different guarding device. 194 F.3d at 1266.

The Court of Appeals then held, however, that Purswell's credentials did not qualify him to testify as an expert in this case on possible alternative designs 194 F.3d at 1271, and, critically, that:

> As noted, most of the proposed design modifications discussed by Purswell and Kennedy lacked an adequate foundation of reliability. Simply throwing out a concept and suggesting it may be feasible is an insufficient basis 'for relaxing the usual first-hand knowledge requirement of the Federal Rules of Evidence on the ground that the expert's opinion has a reliable basis in knowledge and experience of his discipline.' [Cite]

Having determined that most of plaintiff's experts' testimony regarding proposed design modifications was inadmissible because it lacked an adequate foundation of reliability, the Court went on to hold that because, in its opinion, *one* theory of design modification, i.e. placing different guards on the baler was "feasible," the introduction of inadmissible theories of design defect became harmless error. 184 F.3d at 1271. This holding has no legal or logical basis. The introduction of improper theories of design defect could not possibly be "harmless error" under these circumstances; *as a matter of law*, it was reversible error. ***Robertson***; ***see Sunkist Growers***.

Because of the jury's general verdict, it is impossible to determine at all, much less with "conviction," that the jury was not influenced by the evidence which the Court of Appeals held was inadmissible. ***Robertson***. The jury alone is vested with the power and obligation to weigh conflicting evidence and to assess the credibility of the witnesses. ***Rodgers v. Hyatt***.

The jury could have determined, based upon Purswell's inadmissible testimony, that Gehl should have installed an emergency shut-off mechanism on the baler. Or, the jury could have determined, based upon Purswell's inadmissible testimony, that the pick-up tines on the Gehl baler should have been positioned further back. At the same time, and consistent with the evidence admitted at trial, and consistent with the general verdict, the jury could have also rejected Purswell's and Kennedy's testimony regarding different guarding based upon the testimony of Gehl's expert, Dr. Bobby Clary that the "guards" on the John Deere 510 and Vermeer 504-C balers were: (1) not safety guards at all; (2) installed on balers the design of which was entirely different from that of the Gehl baler; (3) would not have prevented this accident; and (4) that the Gehl baler was not dangerous for lack of additional guarding. 184 F.3d at 1267. Again, because it is impossible to ascertain from the general verdict upon which theory of design defect the jury may or may not have rendered its verdict, the introduction of invalid theories of design defect, through expert testimony the Court of Appeals acknowledged was

inadmissible under ***Daubert*** and ***Kumho Tire,*** was *per se* reversible error, not harmless error. ***Robertson***; ***see Sunkist Growers***.

3. The Court of Appeals' Opinion Usurped the Fact-Finding Function of the Jury.

It is the province of the jury, not an appellate court, to try the facts of a case. ***Maine v. Taylor***, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986); ***Howard v. United States District Court for the District of Colorado***, 318 F.2d 521, 523 (10th Cir. 1963). The jury is vested with the power to weigh conflicting evidence and to assess the credibility of witnesses. ***Rodgers***, ***supra***. Under Kansas law, which applied in this case to plaintiff's product liability claims, the issue of liability for an allegedly defective hay baler is one of fact for the jury. ***Siruta v. Hesston Corp.***, 232 Kan. 654, 659 P.2d 799 (1983); ***see also Elite Professionals v. Carrier Corp.***, 16 Kan.App.2d 625, 827 P.2d 1195 (1992) (where claim is made for strict liability in tort, whether the product was unreasonably dangerous is a question of fact for resolution by the factfinder).

As discussed above, based upon the evidence admitted at trial, the jury could have found that the baler was defective for lack of an emergency shut-off mechanism, but was *not* defective for lack of different guards because, based on Clary's testimony, the "guards" to which plaintiff's experts referred were not intended to prevent, and, in fact, would not have prevented, this accident. Once the Court of Appeals determined that four of the five theories of product defect were invalid because of inadmissible expert testimony, the proper procedural course was to reverse and remand for a new trial. ***See Robertson***. Instead, the Court substituted itself as the trier of fact and determined that the baler was defective for lack of guards, and that a lack of guards caused plaintiff's accident. This, Gehl respectfully submits, an appellate court simply cannot do. ***Siruta***; ***see Howard***.

CONCLUSION

In light of the foregoing, Gehl requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, and subsequently reverse the decision below, and order that the case be remanded to the United States District Court for the District of Kansas for a new trial on all issues.

DATED this 8 day of December, 1999.

Respectfully submitted,

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APPENDIX A – DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN CASE NO. 98-3152 FILED JULY 27, 1999

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 98-3152

MARY KINSER, individually and as heir at law and personal representative of the
estate of Tim Kinser, deceased,

Plaintiff-Appellee,

v.

GEHL COMPANY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF KANSAS
(D.C. No. 96-2361-EEO)

Submitted on the briefs:

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Before **KELLY**, **McWILLIAMS**, and **BRISCOE**, Circuit Judges.

BRISCOE, Circuit Judge.

Defendant Gehl Company appeals from the district court's denial of its motion for judgment as a matter of law or, in the alternative, for new trial following a jury verdict in favor of plaintiff in this product liability lawsuit. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

Prior to his death, Tim Kinser operated a farm in Jennings, Kansas. On August 17, 1994, while baling alfalfa with his Gehl model 1870 big round baler, Kinser became entangled up to his waist in the compression rollers of the baler's feed intake unit. Farmhand Jeff Rhoades first arrived on the scene and, noting the tractor's engine was on and the power take-off (PTO) device, which transmits power from the tractor to the baler, was still engaged, turned off all machinery and attempted to assist Kinser in extricating himself from the baler. Unable to provide much help on his own, Rhoades obtained the assistance of fellow farmer George Gassman and the two used bumper jacks and an acetylene torch to free Kinser. Although an ambulance immediately transported Kinser to the Decatur County Hospital, he lost consciousness during the ride and was pronounced dead within thirty minutes of his arrival at the hospital.

In August 1996, plaintiff Mary Kinser,[1] on behalf of herself and her decedent husband's estate, filed the instant product liability diversity action against Gehl, alleging (1) strict liability for manufacturing and selling an unreasonably dangerous product, (2) negligent design and manufacture, and (3) breach of implied

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[1] Unless stated otherwise, all references to Kinser in this memorandum are to the decedent, Tim Kinser.

warranty by introducing into the stream of commerce an unreasonably dangerous product that was not fit for its intended purpose.

II.

Much of the trial revolved around the design evolution of big round balers. There are two types of such balers on the market: open-throat models and closed-throat models. An open-throat baler utilizes spring-loaded tines to pick up crops off the ground and feeds the material directly into a rotating bale chamber. A closed-throat baler, which was the design of the Gehl 1870 baler used by Kinser, employs a similar pick-up system but, before feeding the crops into the bale chamber, first passes them through a series of compression rollers. These compression rollers create a higher density bale by packing down the initial core of the bale. Once the bale in the chamber has reached the desired size, an automatic tying system is triggered. This mechanism, located on the front of the baler just above the feed intake area, activates an arm that swings twine across the bale in the chamber and cuts the twine when the bale is fully wrapped.

Big round balers were invented in the early 1970s, and Gehl began manufacturing the machines in 1974. In the first decade of the big round baler's existence, numerous manufacturers, including Gehl, built both open-throat and closed-throat models. By the mid-1980s, however, every American manufacturer other than Gehl, for reasons unspecified in the record, had shifted its production exclusively to open-throat balers. Since that time, Gehl has been the sole domestic manufacturer of closed-throat balers.

Gehl's closed-throat balers have undergone multiple design changes from the time they first were manufactured in 1974. The model 1870, which was designed in 1989 and initially sold the following year, is a third-generation machine. (Kinser's specific baler was manufactured on January 9, 1991, and was purchased by him from a licensed dealer on June 18, 1991.) Notwithstanding the general design evolution, numerous former and current Gehl

executives observed that the feed intake area of the baler, with which we are concerned here, has remained essentially the same in all models.

Like all balers discussed in this case, the model 1870 is powered by a PTO and is operative only if the tractor is on, functioning at the same revolutions per minute as the tractor's engine. The only shut-off mechanism for the PTO and, hence, the baler, is located next to the driver's seat on the tractor.

Because of the many moving parts in the 1870 baler's feed intake and assembly areas, Gehl has issued an array of warnings in its operator's manual and posted a series of warning decals on the machine itself detailing the proper handling of the baler. These warnings direct users to follow a "mandatory safety shutdown procedure" before unclogging, cleaning, adjusting, lubricating or servicing the unit. Under this procedure, users must (1) disengage the PTO, (2) shut off the tractor engine and remove the starter key, (3) wait for all movement to stop, and (4) remove all power connections, including the PTO device, from the tractor. It is undisputed that, had Kinser adhered to these instructions, he would not have been injured.

Despite this mandatory shutdown procedure, numerous farmers testified the nature of their work makes it impracticable to abide by the instructions. Farmers frequently work alone and often have only a small window of time in which to harvest crops at ideal climatic conditions. Several farmers noted that it is common for them to get off of their tractor with the PTO engaged to, inter alia, assess feeding problems and general mechanical malfunctions in the feed intake unit, and adjust the twine in the automatic tying mechanism. With respect to the tying mechanism, the twine often breaks or the catch fails to secure one or both of the twine strings. As a result, the twine eludes the cutoff device, leaving twine dangling in front of the baler. A farmer is then forced to sit or lie on the ground directly in front of the baler's pick-up assembly area and rethread the twine. Such a position puts the operator under the PTO tongue and within several inches of the pick-up tines.

As there were no witnesses to the injury, it is unclear exactly how Kinser entangled himself in his baler's pick-up assembly area. Several individuals speculated Kinser was either attempting to unplug[2] the baler or fix the automatic tying mechanism. Plaintiff's expert, Dr. Jerry Purswell, theorized that, as either scenario would have put Kinser within inches of the pick-up tines, Kinser likely lost his footing and was pulled into the machine. Plaintiff's other expert, William Kennedy, echoed this testimony.

Plaintiff presented extensive evidence on the purported defects in the 1870 baler's design. There is no dispute the baler's feed intake area and compression roller design represent potential hazards. In fact, the Farm and Industrial Equipment Institute (FIEI), a trade organization comprised of farm and industrial equipment manufacturers, discussed these hazards at a series of meetings in 1977 and 1978. The FIEI's Big Round Baler Manufacturers' Safety Committee, of which former Gehl vice-president of engineering Donald Burrough was a member, identified entanglement in the feed intake/assembly area as a particular hazard that could lead to the loss of life and limbs and suggested such countermeasures as additional shielding or the all-out elimination of compression rollers. During its six-year existence, the committee also discussed the operational difficulties and accident experiences of all big round baler manufacturers.

Dr. Purswell opined the 1870 baler was defectively designed. He claimed the FIEI's extensive analysis of feed entanglement injuries should have alerted Gehl to the likelihood of Kinser's injury. Purswell further observed the mere posting of warnings is ordinarily insufficient to make a product safe. He noted that under a proper "design hierarchy," warnings constitute an adequate response to a hazard only if the manufacturer is unable to either eliminate the hazard altogether or erect a guard to shield the hazard. Purswell suggested a number of ameliorative possibilities that could have greatly reduced the severity of Kinser's injuries,

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[2] A "plug" occurs when too much crop enters the baler too quickly and the compression rollers stop turning.

including the installation of an automatic shut-off mechanism (in the form of a lanyard or cable) on the front of the baler, movement of the pick-up tines further back along the bottom of the baler, movement of the hay holddown bar (i.e., wind guard) and/or elongation of the PTO tongue to minimize operators' potential proximity to the feed intake area, and construction of a guard in front of the pick-up tines. Purswell highlighted the feasibility of the guarding proposal by noting that John Deere previously had adopted similar modifications to its model 510 closed-throat baler.

Elaborating on Purswell's testimony, Kennedy referenced a guarding device on Vermeer's model 504-C closed-throat baler, maintaining such a guard easily could have been adapted to the Gehl 1870 baler and could have prevented Kinser's death. Kennedy further underscored the importance of "human factors" in product safety design (how operators typically use the machinery). Based on his own discussions with farmers and review of FIEI documents, Kennedy insisted a prudent manufacturer would know farmers frequently step off their tractors and approach attached balers without first disengaging the PTO. He noted that while farmers recognize the potential for injury inherent in this procedure, they do not fully appreciate the magnitude of the risk involved. Kennedy then remarked that two prior accidents involving similar feed intake area injuries in Gehl-manufactured closed-throat balers – the Birchler and Neill cases – should have alerted the company to the need for design changes.

Plaintiff also adduced testimony that not only did Gehl fail to construct any guarding or shielding in front of the 1870 baler's feed intake area, but the company never even considered the baler's potential hazards in its in-house safety committee meetings. In response to plaintiff's request for documents regarding the safety review of the 1870 baler, Gehl produced a single sheet of paper with one line of text on it. Other than suggesting a product safety review was conducted on the 1870 baler in November 1989, the sheet of paper offers no insight whatsoever into what, if any, hazards the company identified in its design of the baler.

According to Burrough, Gehl itself never investigated or studied the issue of human entanglement in closed-throat balers. Kim Viesselmann, Gehl's current project engineer in charge of big round balers, similarly testified he was unaware of any such studies. Viesselmann also noted Gehl has never considered placing a shield or guard in front of the feed intake area nor has it undertaken a "human factors" analysis to assess operator reactions to hazards or the efficacy of its warning instructions and decals. He suggested Gehl has not erected any shielding or guarding in front of the feed intake area because the company does not expect operators to be in that area with the PTO engaged. The testimony of Lance Henrickson, Gehl's product safety engineer, was largely to the same effect.

In its defense, Gehl challenged the qualifications of plaintiff's expert witnesses, offered testimony questioning the feasibility of plaintiff's proposed shielding/guarding designs, highlighted the dissimilarities in designs between the 1870 baler and other closed-throat balers employing various shielding/guarding devices, and suggested Kinser's own failure to recognize an open and obvious danger was the cause of his injuries. Gehl also presented its own expert witness, Dr. Bobby Clary, who holds a Ph.D. in agricultural engineering and has extensive experience in farming and agricultural equipment design. Based on his own review of the 1870 baler, combined with his farming experience and discussion with other farmers, Clary opined that the machine was not dangerous beyond the expectations of farmers who use it.

Following a seven-day trial, the jury returned a verdict finding Gehl 55% at fault and Kinser 45% at fault and assessing $3,849,181 in damages. After making the requisite comparative fault and statutory cap reductions, the district court entered judgment in favor of plaintiff in the amount of $817,049.55. Gehl filed a post-trial motion for judgment as a matter of law, or, alternatively, for new trial. The district court denied the motion in a written order.

III.

Gehl contends plaintiff advanced insufficient evidence to support her product liability claims, thereby entitling the company to judgment as a matter of law. Gehl further contends the district court made a number of erroneous evidentiary rulings that entitle the company to a new trial.

Denial of Motion for Judgment as a Matter of Law

We review de novo the district court's denial of a litigant's motion for judgment as a matter of law filed pursuant to Fed.R.Civ.P. 50(b). ***Vining v. Enterprise Fin. Group, Inc.***, 148 F.3d 1206, 1213 (10th Cir.1998). We will reverse such a ruling "only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." ***Id.*** (citation omitted). In our review, "we may not weigh the evidence, pass on the credibility of witnesses, or substitute our judgment for that of the jury." ***Wolfgang v. Mid-America Motorsports, Inc.***, 111 F.3d 1515, 1522 (10th Cir.1997). Further, we must construe all evidence and the inferences therefrom in the light most favorable to the non-moving party. ***Id.***

Like the district court, we must evaluate the Rule 50(b) motion by looking at all evidence admitted at trial, even that which was admitted in error. ***Schudel v. General Elec. Co.***, 120 F.3d 991, 995 (9th Cir.1997), ***cert. denied***, 118 S.Ct. 1560 (1998); ***Jackson v. Pleasant Grove Health Care Ctr.***, 980 F.2d 692, 695-96 (11th Cir.1993); ***Douglass v. Eaton Corp.***, 956 F.2d 1339, 1343-44 (6th Cir.1992); ***Persinger v. Norfolk & W. Ry. Co.***, 920 F.2d 1185, 1188-89 (4th Cir.1990); ***Sumitomo Bank v. Product Promotions, Inc.***, 717 F.2d 215, 218 (5th Cir.1983); ***Midcontinent Broad. Co. v. North Cent. Airlines, Inc.***, 471 F.2d 357, 358-59 (8th Cir.1973); ***contra Lightning Lube, Inc. v. Witco Corp.***, 4 F.3d 1153, 1199-1200 (3d Cir.1993).

> This rule promotes certainty: litigants need not supplement conditionally admitted evidence, perhaps unnecessarily; and district courts need

> not speculate as to what other evidence might have been offered if the evidence had been excluded at trial. The rule promotes fairness: punishing a litigant for the court's erroneous admission of evidence is unfair; and the remedy of a new trial is available to put both sides on an equal footing.

Schudel, 120 F.3d at 995 (citing ***Jackson***, 980 F.2d at 696 n. 4).

1. Strict Liability

Kansas has adopted the strict liability doctrine set forth in Restatement (Second) of Torts § 402A (1964), and its accompanying comments. ***Jenkins v. Amchem Prods., Inc.***, 256 Kan. 602, 886 P.2d 869, 886 (1994) (citing ***Brooks v. Dietz***, 218 Kan. 698, 545 P.2d 1104, 1108 (1976)). The Kansas pattern instruction on strict liability, which the Kansas Supreme Court has embraced, ***see id.***, and which the district court gave here, tracks the language of the restatement. ***See*** Pattern Instructions Kansas-Civil 128.17 (3d ed.1997). The instruction provides:

> A manufacturer who sells a product in a defective condition which is unreasonably dangerous to the user is subject to liability for physical harm thereby caused to the ultimate user if:
>
> (1) The manufacturer is in the business of making such a product; and
> (2) It is expected that the product will reach and does reach the user without substantial change in the condition in which it is sold.
>
> This rule applies although the manufacturer has exercised all possible care in the preparation and sale of its product and although the manufacturer has not bought the property from or entered into

> any contractual relation directly with the manufacturer.
>
> *A product is in a defective condition if it has a defect in design, and such defect existed at the time the product left the manufacturer's hands.*
>
> *A defective condition is unreasonably dangerous if it is dangerous when used in the way it is ordinarily used considering the product's characteristics and common usage, and is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.*

Id. (emphasis added).[3]

Gehl insists its 1870 baler is not unreasonably dangerous because the evidence was undisputed that foreseeable users of the baler did not consider it more dangerous than expected "when used safely." We disagree. In evaluating whether a defective condition is unreasonably dangerous, the relevant inquiry focuses on the danger of the product when used in the way it is ordinarily used, not merely "when used safely." ***See Lester v. Magic Chef, Inc.***, 230 Kan. 643, 641 P.2d 353, 357-61 (1982) (adopting the language of Restatement (Second) of Torts § 402A cmt. i). Foreseeable misuse of a product can give rise to a defective design claim. See Kan. Stat. Ann. § 60-3305. Although some farmers testified they never position themselves directly in front of the baler's feed intake area with the PTO engaged, not all did. A number remarked that the inherent time constraints in baling often compel them to diagnose general mechanical problems or adjust the automatic tying mechanism with the PTO still engaged.

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[3] The district court appropriately substituted the word "community" in the last sentence with "foreseeable class of users."

Gehl next suggests plaintiff failed to prove the feasibility of an alternative design. Plaintiff advanced sufficient evidence of feasible alternative designs, however, by pointing out the guarding devices on the John Deere 510 and Vermeer 504-C closed throat balers, both of which were available at the time the Gehl 1870 baler was first sold. In any event, Kansas law does not mandate such evidence as a prerequisite to recovery in a defective design product liability case. See Jenkins, 886 P.2d at 890 ("[E]vidence of a feasible alternative design is admissible in design defect cases, though it probably is not required."); ***Siruta v. Hesston Corp.***, 232 Kan. 654, 659 P.2d 799, 808 (1983) ("In products liability cases, the plaintiff in sustaining its burden to prove that a product is defectively designed may properly show the feasibility of a safer design."). Like many other states, Kansas law holds that a feasible alternative design is merely one factor a jury may consider in determining whether a product is defective. ***See Potter v. Chicago Pneumatic Tool Co.***, 241 Conn. 199, 694 A.2d 1319, 1331-33 & n. 11 (1997) (cataloguing cases on the four approaches courts have taken on this issue).

Gehl further contends it is entitled to judgment as a matter of law because Purswell and Kennedy were unqualified to render expert opinions on the design of the 1870 baler. We reject this argument. The qualification of an expert witness is a preliminary question of law, Fed.R.Evid. 104(a), which, assuming an objection has been registered, the district court must assess as part of its gatekeeping function prior to admitting to the testimony. ***See Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 592-93, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Notwithstanding Gehl's pre-trial motion in limine, the court refused to conduct a Daubert hearing in order to evaluate the reliability of plaintiff's experts and the relevance of their proposed testimony.[4] ***Kinser v. Gehl Co.***,

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[4] As noted in our discussion of Gehl's new trial request, the district court's error was entirely understandable in light of our then-controlling precedent in ***Compton v. Subaru of Am., Inc.***, 82 F.3d 1513 (10th Cir.1996).

989 F.Supp. 1144, 1147 (D.Kan.1997). The remedy for this error, however, is, at best, a new trial. As noted above, we must analyze the denial of a motion for judgment as a matter of law by looking at all evidence admitted at trial, including evidence that should have been excluded. ***Schudel***, 120 F.3d at 995. Looking at all evidence admitted at trial, we conclude the record supports a finding of defective design strict liability.

2. Negligence

The record also is sufficient to support the jury's verdict on a negligence-based theory.

> [T]he characteristic that distinguishes strict liability from negligence is proof of actual or constructive knowledge of risk: In a negligence action we focus on the defendant's conduct and require plaintiff to show defendant acted unreasonably in light of a known or constructively known risk. In strict liability actions, on the other hand, we focus not on the reasonableness of a defendant's conduct but on the product, and we either ignore the question of a manufacturer's actual or constructive knowledge of risk (as in a "consumer expectations" design defect case) or we in effect impute to the manufacturer defendant current scientific knowledge of the risk caused by his product (as in a risk/benefit design defect balancing test).

Johnson v. American Cyanamid Co., 239 Kan. 279, 718 P.2d 1318, 1324 (1986) (citation omitted).

A manufacturer has a duty to use ordinary care in the design of a product so that the product will be reasonably safe for the use for which it is intended or which can reasonably be anticipated. ***Garst v. General Motors Corp.***, 207 Kan. 2, 484 P.2d 47, 60 (1971); Pattern Instructions Kansas-Civil 128.02 (3d ed.1997). A

number of factors are considered in assessing whether a manufacturer has employed the requisite amount of due care, including (1) whether others in the field are using the same design or a safer design, (2) whether a safer design not yet in use is known to be feasible, and (3) whether, in the case of a new product, adequate testing has been conducted. ***Garst***, 484 P.2d at 61. Although a manufacturer has an obligation to exercise reasonable care in product design, the manufacturer is not an insurer that its product is accident-proof or incapable of producing injury. ***Id.*** Nor is the manufacturer required to adopt only those features that "represent the ultimate in safety or design." ***Id.***

To prevail on a defective design negligence claim, a plaintiff must establish that there was a defect in the product and not simply that a better design might have been possible. ***Id.***

> To prove defective design, it is insufficient merely to assert that a different design would have alleviated or averted the plaintiff's injuries, since it may be assumed that any particular accident involving man and machine might have been avoided through a variation in the design of the machine. [Moreover,] such a variation might greatly magnify the chances of other sorts of mishaps taking place, or else render the machine incapable of reasonably efficient performance of its function.

Id. at 61 (quotation omitted). Evaluation of such a negligence claim entails a risk-utility analysis in which the inherent risks associated with the product are balanced against the product's utility and the burden necessary to eliminate or reduce the risk. ***Patton v. Hutchinson Wil-Rich Mfg. Co.***, 253 Kan. 741, 861 P.2d 1299, 1310 (1993) (citing Restatement (Second) of Torts §§ 291-293 (1964)). The inquiry into defectiveness is confined to the time of sale. ***Id.*** at 1307. Kansas law imposes no duty to recall or retrofit a product not defective at the time of sale:

> If a product is not defective when it is first sold, it does not thereafter become defective by reason of technological improvements or other knowledge gained by the manufacturer. Foreseeability is the litmus test of whether a manufacturer is liable for a product that is defective when it is first sold.

Id.

In addition to the evidence outlined in our discussion of plaintiff's strict liability claim, there was testimony suggesting Gehl largely ignored the 1870 baler's potential hazards in its product safety reviews. Gehl appears to have conducted little or no investigation into the issue of human entanglement in the baler's feed intake area. Despite the fact that other manufacturers had erected shielding and/or guarding around the pick-up assembly areas of their closed-throat balers, Gehl never even considered installing such devices, thereby ignoring proper design hierarchy. Although Gehl executives were aware of human entanglement injuries, the company apparently decided such injuries were attributable to operator negligence and did not necessitate design changes. In sum, there was ample evidence to establish negligence on the part of Gehl.[5]

Denial of Motion for New Trial

Reiterating many of the same points raised in its post-trial motion, Gehl contends it is entitled to a new trial because the district court erred in (1) permitting Purswell and Kennedy to testify as expert witnesses, notwithstanding their alleged lack of qualifications, (2) instructing the jury on a manufacturer's duty to test for defects, (3) admitting evidence of the Birchler accident, (4)

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[5] Gehl has not specifically addressed the implied warranty theory in its brief. For largely the same reasons outlined in our discussion of plaintiff's remaining theories, we believe the evidence was sufficient to support recovery under an implied warranty theory.

allowing Purswell and Kennedy to rely on and reference documents purportedly from the FIEI, and (5) admitting Burrough's deposition excerpts.

1. Qualifications of Plaintiff's Expert Witnesses

Prior to trial, Gehl challenged the qualifications of plaintiff's expert witnesses and requested a Daubert hearing at which the court could assess the relevance and reliability of the experts' proposed testimony. Relying on our then-controlling precedent in ***Compton v. Subaru of Am., Inc.***, 82 F.3d 1513 (10th Cir.1996), the district court denied the request, holding that a ***Daubert*** analysis was unnecessary inasmuch as "the testimony and opinions of Kennedy and Purswell are based solely on engineering background and experience, and not upon a particular methodology or technique." ***Kinser***, 989 F.Supp. at 1147. In a single sentence, the court then stated plaintiff's experts' proposed testimony satisfied the "traditional Rule 702 inquiry." ***Id.***

In Daubert, the Supreme Court held district judges must act as gatekeepers in admitting expert testimony, thereby ensuring that such evidence is both relevant and reliable. ***Daubert***, 509 U.S. at 589, 113 S.Ct. 2786.

> Unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. Presumably, this relaxation of the usual requirement of firsthand knowledge – a rule which represents a most pervasive manifestation of the common law insistence upon the most reliable sources of information – is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.

Id. at 592, 113 S.Ct. 2786 (internal citations omitted). Although we interpreted Daubert to be limited to expert testimony grounded in some scientific principle or methodology, see Compton, 82 F.3d

at 1518-19, the Supreme Court recently rejected that interpretation in ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 119 S.Ct. 1167, 1170, 143 L.Ed.2d 238 (1999). The Court held that while the factors identified in ***Daubert*** are flexible and non-exclusive, the testimony of all experts whose data, principles, methods, or application are called into question must be assessed for relevance and reliability as a precondition to admissibility. ***Id.*** 119 S.Ct. at 1175.

Because the district court did not hold a Daubert hearing or make any findings on the qualifications of plaintiff's experts, our review is difficult. If the court had conducted a ***Daubert*** analysis, we would examine its admissibility ruling under an abuse of discretion standard. ***See General Elec. Co. v. Joiner***, 522 U.S. 136, 118 S.Ct. 512, 519, 139 L.Ed.2d 508 (1997). Here we have no findings to review. Confronting a nearly identical situation, the Fifth Circuit recently implied a trial court's omission may be harmless error if the record contains sufficient indicia of the experts' qualifications. ***See Tanner v. Westbrook***, 174 F.3d 542 (5th Cir.1999). The Fifth Circuit essentially undertook its own ***Daubert*** analysis based on the materials submitted by both sides in regards to the defendant's motion for a Rule 104(a) hearing. ***Id.*** at 545-46. While this approach is generally reasonable, we do not think it necessary to confine our review to the materials accompanying the Daubert hearing request. Rather, we believe we may look at the entire record, including testimony presented at trial.

Purswell has a bachelor's degree in mechanical engineering, a doctorate in industrial engineering, and has taught classes on "product design from an ergonomics standpoint" (i.e., how individuals interact with products). He has consulted for agricultural manufacturers in litigation on numerous occasions, analyzing the adequacy of instructions, warnings, and guarding on certain farm equipment. He also has published articles suggesting product warnings are limited in their ability to influence individuals to operate products safely.

These credentials alone do not qualify Purswell to testify as an expert in this case on possible alternative designs. Indeed, Purswell acknowledged he has no practical experience in mechanical design. He focuses solely on concepts and has no expertise with respect to the design of products under a traditional engineering method. He has never published a single paper examining any type of agricultural equipment, never operated a big round baler, and, excluding this case, never consulted on behalf of a plaintiff or manufacturer regarding big round balers. In fact, other than familiarizing himself with the deposition testimony of three farmers, Purswell has neither investigated nor spoken with any individual regarding their experience with big round balers.

Furthermore, Purswell admitted there is a well-recognized methodology which engineers in the field of product design must follow before recommending a design for a particular piece of equipment. To propose a design concept or design change without engaging in each of the steps of this methodology contravenes the engineering code of ethics. Purswell conceded his recommended changes for the 1870 baler were all mere concepts; he neither developed designs nor tested the feasibility or safety of any of his proposals.

As for Kennedy, he has a bachelor's degree in mechanical engineering and now works as a "forensic engineer" at his own consulting firm focusing on product and vehicle accident reconstruction. He did not attempt to reconstruct Kinser's injury. In preparation for his testimony, Kennedy reviewed the depositions of several farmers, traveled to western Kansas to take measurements of and watch Kinser's (repaired) 1870 baler in use, and examined both industry standards publications and various big round baler manufacturers' operator's manuals. Kennedy acknowledged, however, that he has never designed a piece of agricultural equipment or operated a hay baler. After embracing Purswell's testimony regarding the necessity of following a strict engineering methodology before proposing design solutions to a manufacturer, Kennedy also conceded he had not adhered to that methodology before testifying on possible design changes for the

1870 baler. He merely reviewed the production run of similar guarding utilized by John Deere.

A number of circuits have suggested the testing of alternative design proposals is often a critical component to the reliability of an engineer expert witness' testimony on this subject. ***See Dancy v. Hyster Co.***, 127 F.3d 649, 651-52 (8th Cir.1997); ***Watkins v. Telsmith, Inc.***, 121 F.3d 984, 989-90 (5th Cir.1997); ***Peitzmeier v. Hennessy Indus., Inc.***, 97 F.3d 293, 296-98 (8th Cir.1996); ***Cummins v. Lyle Indus.***, 93 F.3d 362, 368-69 (7th Cir.1996). Hands-on testing, of course, is not an absolute prerequisite to the admissibility of expert testimony. ***Cummins***, 93 F.3d at 369. An engineer expert could establish the reliability of his proposed design changes, for example, "through the review of experimental, statistical, or other scientific data generated by others in the field." ***Id***. We need not decide here the scope of any testing requirements. It is sufficient to say that in the absence of some indicia of reliability of the expert's proposed designs, exclusion of expert testimony is appropriate.

As noted, most of the proposed design modifications discussed by Purswell and Kennedy lacked an adequate foundation of reliability. Simply throwing out a concept and suggesting it may be feasible is an insufficient basis "for relaxing the usual first-hand knowledge requirement of the Federal Rules of Evidence on the ground that the expert's opinion has a reliable basis in knowledge and experience of his discipline." ***Id***. Nevertheless, Purswell and Kennedy also recommended guards/shielding which previously have been demonstrated feasible on the John Deere 510 and Vermeer 504-C closed throat balers, both of which were in use years before the Gehl 1870 baler first hit the market. Purswell and Kennedy further testified that the use of such guards/shielding could have prevented or, at a minimum, greatly reduced the severity of Kinser's injuries. Although federal law governs this admissibility issue, it is guided in part by the substantive state law. Under Kansas law, "[o]ne of the most significant factors in [determining whether a manufacturer has exercised due care in the design of its product] is whether others in the field are using the same design, or a safer design." ***Garst***, 484 P.2d at 61.

Accordingly, while we believe much of the expert testimony rendered by Purswell and Kennedy should have been excluded under a ***Daubert*** analysis, we conclude any error ultimately was harmless and a new trial is thus unwarranted.

2. Duty to Test Instruction

Gehl claims the district court erred in submitting a failure to test instruction to the jury. Gehl argues there was no evidence in the record as to what testing should have been done or what testing would have revealed. In a diversity case, the substance of a jury instruction is a matter of state law, but the grant or denial of a tendered instruction is a procedural matter governed by federal law. ***Wolfgang***, 111 F.3d at 1525. When a party objects to instructions given at trial, we conduct "a *de novo* review to determine whether, as a whole, the instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards." ***Advantor Capital Corp. v. Yeary***, 136 F.3d 1259, 1265 (10th Cir.1998) (internal quotation omitted). Assuming the instruction properly sets forth the relevant law, we review the district court's decision to give the particular instruction for an abuse of discretion. ***Allen v. Minnstar, Inc.***, 97 F.3d 1365, 1368 (10th Cir.1996).

The Kansas Supreme Court has described a manufacturer's duty to test as follows:

> The rule is that a manufacturer has a duty to make such tests and inspections, during and after the process of manufacture, as should be recognized as being reasonably necessary to secure the production of a safe product; and a manufacturer who negligently fails to use reasonable care in making such tests and inspections, and thereby produces a defective article which causes damage while being put to an ordinary anticipated use, is liable for such damage.

Lindquist v. Ayerst Labs., Inc., 227 Kan. 308, 607 P.2d 1339, 1350 (1980) (quotation omitted). We conclude the record justifies the issuance of a duty to warn instruction. Plaintiff advanced sufficient evidence suggesting that, if Gehl had evaluated the efficacy of warnings on its 1870 baler or examined closed-throat baler feed intake entanglement injuries in the industry, the company would have learned of the excessive dangers posed by the 1870 baler's design and the availability of ameliorative devices. In addition, plaintiff adduced testimony from Gehl's own current and former employees regarding the inadequacy of the company's product safety reviews, offering insight to jurors on why Gehl may not have identified defects in proposed and/or current product designs.

3. Evidence of Previous Accidents

Gehl maintains the district court improperly admitted evidence of a prior closed-throat baler entanglement injury for the purpose of showing the company had notice of defects in the 1870 baler. Specifically, Gehl claims it was error to admit evidence on the injuries suffered by the plaintiff in the Birchler case. We review the district court's evidentiary rulings for an abuse of discretion. ***Pandit v. American Honda Motor Co.***, 82 F.3d 376, 379 (10th Cir.1996). Under this standard, "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." ***Id.*** (citation omitted).

Both federal and Kansas law permit the introduction of similar accidents in product liability actions to prove "notice, the existence of a defect, or to refute testimony given by a defense witness that a given product was designed without safety hazards." ***Ponder v. Warren Tool Corp.***, 834 F.2d 1553, 1560 (10th Cir.1987); ***see Powers v. Kansas Power & Light Co.***, 234 Kan. 89, 671 P.2d 491, 499 (1983) ("Evidence of prior similar accidents is admissible to prove foreseeability."). As a prerequisite to admitting such evidence, the proponent must demonstrate "the circumstances surrounding the other accidents were substantially

similar to the accident involved in the present case." ***Wheeler v. John Deere Co.***, 862 F.2d 1404, 1407 (10th Cir.1988) (citations omitted). The requisite degree of substantial similarity is tied to the proponent's theory of proof:

> If dangerousness is the issue, a high degree of similarity will be essential. . . . If the accident is offered to prove notice, a lack of exact similarity of conditions will not cause exclusion provided the accident was of a kind which should have served to warn the defendant. . . . Once a court has determined that accidents are substantially similar, any differences in the circumstances surrounding those occurrences go merely to the weight to be given the evidence.

Ponder, 834 F.2d at 1560 (citations omitted) (first alteration in original).

The accident culminating in the Birchler lawsuit involved an individual who became entangled in the feed intake area of a Gehl model 1500-A closed-throat baler. According to Kennedy, the Birchler plaintiff went into the machine following the same path as Kinser. Although Gehl emphasizes that the 1500-A baler in Birchler is different than the 1870 baler at issue in the instant action, the difference is largely immaterial inasmuch as there is abundant testimony that the feed intake areas on the two models are virtually identical.

Noting that the accident in Birchler pre-dated Kinser's purchase of his 1870 baler, Gehl also insists it could not have been put on notice of any defects in its 1870 baler as a result of the Birchler accident. We have held before that a substantially similar prior accident may be used to establish notice only if it occurred sufficiently prior to the date of the subject incident that defendant could have taken steps to remedy the situation. ***Julander v. Ford Motor Co.***, 488 F.2d 839, 846 (10th Cir.1973). It is undisputed here that Gehl did not receive notice of the injuries in the Birchler accident, which occurred in August 1990, until August 1991.

Kinser's 1870 baler was manufactured in January 1991 and sold to him in April 1991. Gehl is thus correct that the Birchler incident itself would not have put the company on notice of a defect in Kinser's specific baler.[6]

Any error the district court may have committed by admitting testimony on the Birchler incident was harmless. Plaintiff offered evidence of another similar accident – an entanglement injury in a closed-throat baler's feed intake area – in the Neill case that took place nearly a decade before Kinser's injury. Birchler, therefore, did not represent Gehl's first notice of potential deficiencies with the feed intake area design of closed-throat balers. Gehl does not object to the introduction of testimony on Neill. Moreover, the court invited Gehl to mitigate the effect of this evidence by having Gehl executives testify that nothing about the Birchler accident, including the verdict, compelled the company to alter the design of its closed-throat balers. Gehl did not avail itself of this opportunity. Accordingly, the company is in no position to complain about the error on appeal.

4. FIEI Documents

Gehl maintains the court erred in allowing plaintiff to elicit testimony on and reference various documents purportedly issued by the FIEI. We discern no abuse of discretion in the court's rulings. None of these documents were admitted into evidence. The materials simply were used by plaintiff's expert witnesses as a partial basis upon which to assess Gehl's knowledge of closed-throat baler hazards and exercise of due care (or lack thereof) in product design. Federal Rule of Evidence 703 provides:

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[6] Plaintiff's suggestion that Gehl's August 1991 notice of the Birchler incident should have triggered a post-sale duty to warn must be rejected. At no time in the district court did plaintiff raise a duty to warn claim. We will not entertain issues raised for the first time on appeal. ***Walker v. Mather (In re Walker)***, 959 F.2d 894, 896 (10th Cir.1992).

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Gehl has been a member of the FIEI (now named the Equipment Manufacturers' Institute) since the time of its formation in the 1970s. Burrough, who served as a member of the FIEI's Big Round Baler Committee, testified that the organization discussed closed-throat baler hazards and entanglement injuries in its meetings. The minutes of these meetings and correspondence between committee members are easily characterized as proper bases upon which an expert witness may rely for opinions regarding a manufacturer's knowledge of possible hazards and/or design defects. ***See Nanda v. Ford Motor Co.***, 509 F.2d 213, 222 (7th Cir.1974) (citations omitted) ("Facts or data found in the literature of the profession, even though not themselves admissible in evidence, properly form a part of the basis for an expert's opinion.").

Gehl attacks the reliability of these materials by underscoring the paucity of evidence in the record authenticating the documents. Rule 703, however, permits expert witnesses to base their opinions on evidence that is inadmissible under the hearsay, authentication, and best evidence rules. 29 Charles A. Wright and Victor J. Gold, ***Federal Practice and Procedure*** § 6273, at 311 (1997). "The rationale for this aspect of Rule 703 is that experts in the field can be presumed to know what evidence is sufficiently trustworthy and probative to merit reliance." ***Id.*** Although the district court could have precluded the reference to these documents, it did not abuse in discretion in refusing to do so.

5. Burrough Deposition Excerpts

Gehl's final argument is that the deposition excerpts of Burrough read to the jury constitute inadmissible hearsay. Plaintiff read excerpts of Burrough's depositions from three previous product liability lawsuits involving big round baler injuries: Birchler (1993 deposition), Neill (1991 deposition), and Dunnahoe (1985 deposition). Gehl grounds its challenge to this testimony on Fed.R.Evid. 801(d)(2). This rule provides, in relevant part, that a statement is not hearsay if --

> [t]he statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by that party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of agency or employment made during the existence of the relationship. . . . The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C) [or] the agency or employment relationship and scope thereof under subdivision (D).

Although Burrough had retired at the time of these depositions, he continued to perform consulting services for Gehl on projects he had overseen during his full-time tenure with the company. Moreover, prior to being deposed in this case, current project engineer Viesselmann met with Burrough to review the former structure of Gehl's engineering department and the evolution of Gehl's closed-throat balers' designs. The preceding facts, both of which were established through Viesselmann's testimony, constitute independent and sufficient corroboration of Burrough's authority to make statements on behalf of Gehl and/or the scope of Burrough's employment. Because the topics discussed in Burrough's deposition excerpts all concerned events

and policies occurring during his employment, the district court did not err in admitting this testimony pursuant to Rule 801(d)(2).

IV.

The judgment of the district court is AFFIRMED.

APPENDIX B – ORDER DIRECTING RESPONSE TO PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARY KINSER, individually and as heir at law and personal representative of the estate of Tim Kinser, deceased	)	
Plaintiff-Appellee,	)	
v.	)	No. 98-3152
GEHL COMPANY,	)	
Defendant-Appellant.	)	

ORDER

Filed August 11, 1999

Before **KELLY, McWILLIAMS,** and **BRISCOE,** Circuit Judges.

The court has for consideration appellant's Petition for rehearing En Banc, Or, Alternatively, For Panel Rehearing.

Within 15 days of the date of this order appellee shall file a response to the petition.

Entered for the Court

PATRICK FISHER, Clerk of Court

by:
Deputy Clerk

APPENDIX C – ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARY KINSER, individually and as heir at law and personal representative of the estate of Tim Kinser, deceased	)	
Plaintiff-Appellee,	)	
v.	)	No. 98-3152
GEHL COMPANY,	)	
Defendant-Appellant.	)	

ORDER

Filed September 10, 1999

Before **KELLY, McWILLIAMS,** and **BRISCOE,** Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as

required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court

PATRICK FISHER, Clerk of Court

by:
Deputy Clerk